FILE COPY

SUPREME COURT OF THE [illegible]

OCTOBER TERM, 19[illegible]

No. 123

DIRK De JONGE,

Appellant,

vs.

STATE OF OREGON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON.

STATEMENT AS TO JURISDICTION.

Osmond K. Fraser,

Counsel for Appellant.

[illegible]

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provisions	1
Statute the validity of which is involved	2
Dates	3
Nature of the case	4
Appellant's contentions	8
Substantial Federal questions are presented	9

TABLE OF CASES CITED.

Connally v. General Construction Co., 269 U. S. 385	11
De Jonge v. Oregon, 22 Oreg. (Adv. Sheets No. 8) 317, 51 Pac. (2d) 674, 22 Oreg. (Adv. Sheets No. 4)	8
Fiske v. Kansas, 274 U. S. 380	8, 11, 13
Grosjean v. American Press Co., Inc., No. 303, October Term, 1935 (decided February 10, 1936)	11
International Harvester Co. v. Kentucky, 234 U. S. 216	11
Near v. Minnesota, 283 U. S. 697	11
State v. Butterworth, 104 N. J. Law 580, 142 Atl. 57	12
Stromberg v. California, 283 U. S. 359	11
United States v. Cruikshank, 92 U. S. 542	11
United States v. L. Cohn Grocery Co., 255 U. S. 81	11
Whitney v. California, 274 U. S. 357	11

STATUTES CITED.

Constitution of the United States, First amendment	6, 7, 8, 9
14th amendment, Section 1	6, 7, 8, 9
Judicial Code, Section 237 (a), as amended (28 U. S. C. A. 344)	2
Oregon Criminal Syndicalism Law, Oregon Code of 1930, as amended by Chapter 459, Oregon Laws of 1933, Paragraph 14-3110	2
Paragraph 14-3111	2
Paragraph 14-3112	3, 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 123

DIRK DE JONGE,

Appellant,

vs.

STATE OF OREGON.

Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THIS HONORABLE COURT:

Dirk De. Jonge, the above named appellant, herewith makes his statement, in accordance with Rule 12 of the Rules of this Court, particularly describing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of conviction rendered by the Circuit Court of the State of Oregon for Multnomah County, which judgment was affirmed by the Supreme Court of the State of Oregon.

A. Statutory Provisions.

The statutory provisions upon which your appellant relies to sustain jurisdiction of the Supreme Court is Judicial

Code 237 (a), as amended (28 U. S. C. A., Section 344), which, so far as pertains herein, provides:

> "A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had * * * wherein is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

B. Statute, the Validity of Which is Involved.

Appellant challenges the validity of the Oregon Criminal Syndicalism Law, being paragraphs 14-3110, 14-3111 and 14-3112, Oregon Code of 1930, as amended by Chapter 459, Oregon Laws of 1933, which reads as follows:

"AN ACT to amend sections 14-3,110, 14-3,111 and 14-3,112, Oregon Code 1930, and to repeal section 14-3,113, Oregon Code 1930, relating to criminal syndicalism.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:

SECTION 1. That section 14-3,110, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

SEC. 14-3,110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

SECTION 2. That section 14-3,111, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

SEC. 14-3,111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

SECTION 3. That section 14-3,112, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

SEC. 14-3,112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than 10 years, or by a fine of not more than $1,000, or by both such imprisonment and fine.

SECTION 4. That section 14-3,113, Oregon Code 1930, be and the same hereby is repealed."

C. **Dates.**

The date of the judgment of conviction entered in the Circuit Court of the State of Oregon is November 26, 1934. The date of the affirmance of said judgment by the Supreme Court of the State of Oregon is November 26, 1935. A timely petition for rehearing was entertained by that court and was denied on January 21, 1936. The date upon which the application for appeal is presented is April 17, 1936.

Nature of the Case.

Dirk De Jonge, the appellant herein, together with several others, were jointly indicted by the Grand Jury of Multnomah County, Oregon, on the 29th day of September, 1934, charged with the crime of conducting and assisting in conducting an assemblage of persons an organization advocating criminal syndicalism, the charging part of the indictment being as follows:

> "The said Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart on the 27th day of July, A. D. 1934, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to-wit: The Communist Party, a more particular description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

in violation of Section 14-3112, Oregon Code, 1930, as amended by Chapter 459, General Laws of Oregon for 1933.

The appellant, Dirk De Jonge, requested a separate trial, which request was granted.

The evidence adduced by the State against appellant showed that at 8:00 p. m. on July 27, 1934, at 68 S. W. Alder St. in Portland, Oregon, a meeting sponsored by the Communist Party was held. The announced purpose of the meeting was evidenced by handbills and leaflets issued by the Communist Party, Portland Section, and circulated

in the City of Portland, giving notice of the time and place of this meeting, was to protest against illegal raids on workers' halls and homes, and to protest against the shooting of striking longshoremen by Portland police. There were approximately 160 to 200 people present. No admission charge was made and no questions were asked of those entering as to whether or not they were members of or in sympathy with the Communist Party, and only a small percentage of those present were members of the Communist Party.

The State's witnesses testified that the chairman, Edward R. Denny, stated in opening the meeting that it was a meeting held by the Communist Party, but the defense witnesses all stated that it was not a meeting of the Communist Party but a meeting sponsored by the Communist Party. Denny introduced the various speakers on the program. The first speaker was Don Cluster, a member of the Young Communist League. The second speaker was Dirk De Jonge, the appellant herein, who, upon being introduced, received quite an ovation from those present. Dirk De Jonge talked at some length about the raid on the Workers' Book Shop, the Communist Party's headquarters, the Marine Industrial Workers' Hall, and the International Labor Defense Hall. The three State's witnesses, who were present at the meeting, testified at the trial that Dirk De Jonge requested everyone to do more work in getting more members for the Communist Party, and requested all the people at the meeting to be present at the regular street meeting of the Communist Party to be held on Fourth and Alder Sts. on the following evening, and that during the course of his remarks he used the words "revolutionary tactics" and "defiance of local police authorities".

The defendant and all of the defendant's witnesses denied that Dirk De Jonge had used the words "revolutionary tac-

tics." or "defiance of local police authorities" during the course of his remarks, and they also denied that Dirk De Jonge had requested those present to join the Communist Party or to get more members for the Communist Party.

At the conclusion of his speech De Jonge received a tremendous ovation from those present at the meeting. *The Daily Worker* and *The Young Communist*, a magazine published by the Young Communist League, were sold at the meeting.

The meeting was an orderly one except that there was some confusion when the police entered, which was after the scheduled talks had been made and the meeting was about to be opened for general discussion. A State's witness testified that when the police entered someone hollered "Cops" and disorder broke out immediately, some making a run for fire escapes, stairways and windows. As a result of this raid, De Jonge and several others were arrested.

The State introduced an abundance of official literature of the Communist Party to show that the Communist Party advocates the doctrine of criminal syndicalism and sabotage. This literature was introduced without objection, but only a small portion of the literature introduced was found at the meeting, and none of the literature was written by the appellant or anyone residing in Multnomah County, Oregon.

At the conclusion of the State's case in chief, appellant moved the trial court for an order directing a verdict of acquittal, on the following grounds, among others:

> "That the Oregon criminal syndicalism law as amended by the 1933 Legislature violates Amendment I of the United States Constitution * * * and Section 1 of Amendment XIV of the United States Constitution. * * *"
>
> "If the evidence introduced by the prosecution be held sufficient to go to the jury upon the portion of the

criminal syndicalism statute under which the defendant is here charged, then that portion is a violation of the due process clause of the 14th Amendment to the United States Constitution, because it demands that the defendant comply with a standard of conduct which he could not know in advance."

To the disallowance of said motions exceptions were taken with reference to each of the grounds set forth.

Thereafter and at the conclusion of the testimony, the appellant again moved the trial court for a directed verdict, on the following grounds, among others:

"That the Oregon criminal syndicalism law as amended by the 1933 Legislature violates Amendment I of the United States Constitution and Section 1 of Amendment XIV of the United States Constitution."

In disallowing the said motion for a directed verdict, the court said:

"The record may show that the motion for a directed verdict of acquittal is denied, and an exception is allowed as to the ruling with reference to each of the specifications set forth."

The jury returned a verdict of guilty and recommended leniency, and based thereon the court entered a judgment of conviction and sentenced appellant to a term of seven years in the Oregon State Penitentiary.

From said judgment of conviction appellant appealed to the Supreme Court of Oregon, alleging as reversible errors, among others, the failure of the trial court to direct a verdict of acquittal and the repugnancy of the Oregon criminal syndicalism law as amended in 1933 to Section 1 of Amendment XIV of the United States Constitution, particularly as construed to sustain the judgment of conviction. The

Supreme Court considered the questions raised under the Constitution of the United States, stating in its opinion:

> "The appellant contends that the State criminal syndicalism law as applied in the present instance is violative of the 14th Amendment of the said Constitution and of Article I, paragraphs 8 and 26, of the Oregon Constitution. Relying on the case of *Fiske* v. *Kansas*, 274 U. S. 380 (71 L. Ed. 1108, 47 S. Ct. 655), it is insisted that the law as applied to the present case is an arbitrary and unreasonable exercise of the police power of the state and unwarrantably infringes the liberty of the defendant."

Despite these contentions made by appellant and noted for consideration by the court, the court affirmed the judgment of conviction, upholding the Oregon criminal syndicalism law, as amended by the 1933 Legislature and as applied in this instance, not to be in conflict with Section 1 of Amendment XIV of the United States Constitution.

Vol. 21, No. 8, page 317, Advance Sheets, Supreme Court of the State of Oregon; 51 Pac. 2nd 674, 679.

A petition for rehearing was seasonably made, appellant again urging the repugnacy of the Oregon criminal syndicalism law as amended in 1933 and particularly as applied in this instance, to Section 1 of Amendment XIV of the United States Constitution. The motion for rehearing was denied, without written opinion, on January 21, 1936.

Vol. 22, No. 4, Advance Sheets, Supreme Court of the State of Oregon.

Appellant's Contentions.

Appellant contends:

1. That the statute as construed and applied by the Supreme Court of Oregon unreasonably restricts appellant's freedom of speech and assembly, and is therefore invalid

under the due process clause of the 14th Amendment to the Constitution of the United States.

2. That the statute as construed by the Supreme Court of Oregon contains a standard of guilt which is so vague and uncertain that it is not susceptible of reasonable application, and is therefore invalid under the due process clause of the 14th Amendment to the Constitution of the United States.

Substantial Federal Questions are Presented.

Under the criminal syndicalism law of Oregon as construed by the Supreme Court of Oregon, one who shall preside at, conduct or assist in conducting any assemblage of persons, or any society or any group which generally teaches or advocates the doctrine of criminal syndicalism or sabotage, is guilty of a felony, even though membership in such an assemblage, society or group is lawful, and even though the meeting in question was called for a lawful purpose and even though no unlawful doctrines were taught, advocated or even uttered at that meeting.

We submit that the statute as construed by the State court deprives appellant of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States, and raises substantial Federal questions.

1. The statute as construed above contains a standard of liability which is so vague and uncertain that it is not susceptible of reasonable application.

Under this construction no person could risk speaking at a meeting called by the Communist Party, for the following reasons:

a. It is not necessary that the defendant be a member of the Communist Party or be in sympathy with any portion of its program.

b. It is not necessary that the defendant teach or advocate any of the doctrines of the Communist Party which are offensive to the statute, at the meeting which he assists in conducting or at any other place or at any other time.

c. It is not necessary that anyone else at the public meeting called by the Communist Party teach or advocate a doctrine offensive to the statute.

In other words, under the statute as construed by the State court a person not a Communist and unsympathetic with the program of the Communist Party, who presides at an orderly public meeting called by the Communist Party, is guilty of a felony, and the fact that the meeting was called to discuss topics of political, economic or social interest, or any other lawful subject, and the fact that only a small percentage of those present at the meeting were members of the Communist Party or sympathetic with its program, and the fact that neither the defendant nor anyone else at the meeting taught, advocated or even uttered an offensive doctrine would not relieve defendant of criminal liability.

If guilt may be predicated upon the facts stated in the above set of facts, we submit that the statute as so construed would deprive that defendant of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States, but if the above interpretation of the statute is incorrect, then the statute is too vague and uncertain for valid enforcement, and is repugnant to the due process clause of the 14th Amendment.

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary rules of fair play

and the settled rules of law. And a statute which either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Connally v. *General Construction Co.*, 269 U. S. 385, 391;

International Harvester Co. v. *Kentucky*, 234 U. S. 216;

U. S. v. *L. Cohn Grocery Co.*, 255 U. S. 81.

2. The statute as construed and applied by the Supreme Court of Oregon unreasonably restricts appellant's freedom of speech and assembly, and is, therefore, invalid under the due process clause of the 14th Amendment to the Constitution of the United States.

The First Amendment to the Constitution of the United States reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

While this provision is a restraint on our national government and not upon the powers of the state (*United States* v. *Cruikshank*, 92 U. S. 542), the States are precluded from abridging the freedom of speech, or of the press, or of assembly, by the due process clause of the 14th Amendment.

Grosjean v. *American Press Co., Inc.*, No. 303, October Term, 1935, Decided February 10, 1936;

Near v. *Minnesota*, 283 U. S. 697;

Stromberg v. *California*, 283 U. S. 359;

Fiske v. *Kansas*, 274 U. S. 380;

Whitney v. *California*, 274 U. S. 357.

In the case of the *United States* v. *Cruikshank, supra,* the Court, in discussing the right of assembly, stated in its opinion:

> "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat., 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.'"

* * * * * * *

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

The facts in the case of *State* v. *Butterworth,* 104 N. J. Law 580, 142 Atl. 57. are similar to those in the case at bar, except that in the cited case the assemblage was approximately ten times as large, and the meeting was held in a public square without a permit, and not in a hall. Although the defendants were indicted for the common law crime of unlawful assemblage and not for a statutory crime, the Court, in discussing one's constitutional rights of assemblage, stated as follows:

> "The right of the people to meet in public places to discuss in open and public manner all questions affecting their substantial welfare, and to vent their

grievances, to protest against oppression, economic or otherwise, and to petition for the amelioration of their conditions, and to discuss the ways and means of attaining that end, were rights confirmed and guaranteed them by the Magna Charta, Petition of Right, and the Bill of Rights, the mainstay of the British Constitution, and the basis for both our Federal and State Constitutions. Of course, it goes without saying, this inestimable boon of liberty was to be enjoyed by the people in a peaceful and law-abiding manner."

It appears from the testimony, a summary of which is contained in the statement of the nature of the case, *supra* (page 4), that appellant was one of the speakers at a public meeting called by the Communist Party to protest against illegal raids on workers' halls and homes, and to protest against the shooting of striking longshoremen by Portland police. No offensive doctrines were taught or advocated at that meeting by appellant or anyone else. This is conceded by the Supreme Court of Oregon, which holds that it was not necessary for the State to prove that any offensive doctrines were taught or advocated at that meeting, it being sufficient to show that on the date charged in the indictment, the Communist Party in Multnomah County was advocating offensive doctrines. The Supreme Court further held that this could be and was proved by the Communist literature, a small amount of which was found in the hall in which the meeting was held, but a great deal of which was introduced at the trial.

The construction of the statute by the court below cannot be regarded as a reasonable exercise of the State's power to protect it against violent assault, and the statute so construed must be regarded as an arbitrary interference with appellant's right of freedom of speech and freedom of assemblage. As in the case of *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, the evidence did not justify the conviction

of appellant under the statute as construed by the court below, and the application of the statute to appellant accordingly deprived him of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States.

WHEREFORE it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of this Court.

OSMUND K. FRAENKEL,
Attorney for appellant,
76 *Beaver St., New York, N. Y.*

GUS J. SOLOMON,
LEO LEVENSON,
IRVIN GOODMAN,
Of Counsel.